1959

In The Matter of the Estate of Hillar L. Vorhees and Betty Hayward Beverly Clyde, and Tracy Collins Trust Co., Administrator v. Pearl O. Voorheesand Hanson Land and Livestock Company

Case No. 9400

IN THE SUPREME COURT of the STATE OF UTAH

IN THE MATTER OF THE ESTATE OF HILLARD L. VORHEES,
Deceased,
BETTY HAYWARD, BEVERLY CLYDE, and TRACY COLLINS TRUST CO., administrator,
Plaintiffs and Respondents,

—vs.—

PEARL O. VOORHEES,
Defendant and Appellant.
HANSON LAND AND LIVESTOCK COMPANY,
Appellant and Intervenor.

BRIEF OF RESPONDENTS

Appeal from the District Court of the Seventh
District in and for the County of Sanpete
Honorable F. W. Keller, Judge

NIELSEN, CONDER AND H

Arthur H. Nielsen
Attorney for Respondents

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STATEMENT OF THE CASE

This case involves joint appeals by appellants Pearl O. Voorhees and Hanson Land and Livestock Company from two judgments of partial distribution of certain property in the estate of Hillard L. Voorhees, Deceased. In addition, appellant Pearl O. Voorhees seeks to appeal from a judgment rendered on October 2, 1959, in the estate of Hillard L. Voorhees, Deceased, and in the civil

action, wherein Betty Hayward and Beverly Clyde appeared as plaintiffs and Pearl O. Voorhees appeared as defendant, the same being Civil No. 4784. This latter judgment was entered by the District Court of Sanpete County in both the probate and civil matters, which had been combined for the purpose of hearing at that time.

STATEMENT OF FACTS

Respondents desire to make their own statement of the facts antedating and giving rise to this appeal so that the Court will have their version, as well as the version of Appellants. For convenience in referring to the parties, Appellant Pearl O. Voorhees will be referred to as Appellant or Appellant Voorhees while Appellant Hanson Land and Livestock Company will be referred to by its name or as Appellant Hanson.

The Record in the Probate Proceedings which is contained in three separate volumes will be referred to by page number, as will the Record in the civil action. Transcript or Deposition references will be the same as those used by Appellants.

It is to be noted that Walker Bank and Trust Company, Administrator of the Estate of Hillard L. Voorhees, deceased, is not an appellant in this matter. However, Hanson Land and Livestock is more than a mere "intervenor" in this case. This appeal questions the action of the lower court in refusing to confirm a sale of certain real property and grazing rights to Appellant Company and in ordering partial distribution

thereof to the heirs. Actually, Appellant Voorhees is only nominally interested in seeking to help Appellant Hanson get the property, as the facts hereinafter related will more fully disclose.

Little need be said concerning the background of the case prior to the decision of this court in an earlier appeal (In the Matter of the Estate of Hillard L. Voorhees, deceased, (December 4, 1958) 8 Ut. 2d 231, 332 P2d 670). (R. 207-208). In its decision in that case this court ordered that Walker Bank and Trust Company be appointed Administrator of the Estate of Hillard L. Voorhess, deceased. It further withdrew its Alternative Writ of Prohibition in connection with the civil action filed by Respondents against Appellant Voorhees to require her to account for substantial property which Respondents claimed belonged in the Estate of their father Hillard L. Voorhees, deceased. (R. 204). In its opinion the court said "the heirs can themselves sue for the recovery to the estate of any property belonging to the decedent". (R. 207-208).

Thereafter Respondents continued with the prosecution of the civil action in the District Court of Sanpete County against Appellant Voorhees to require her to turn into the estate the real and personal property which Respondents claimed belonged to their father at the time of his death. Prior to the time of trial the depositions of all parties were taken including the deposition of Appellant Voorhees. In the Brief of Appellant Voorhees reference is made to some of these depositions as though the testimony were undisputed. This is not the case. Nor

do Respondents concede that the testimony of Mrs. Voorhees in the hearings of October 21st and December 16th, 1957, is correct. Such testimony was given in a proceeding authorized by Sec. 75-11-18, UCA 1953, where a person suspected of having wrongful possession of any property of the decedent may be required to submit to interrogation with respect thereto. In such testimony Appellant Voorhees among other things admitted that she had signed decedent's name on certain documents (Tr. Oct. 21, p. 62). Similarly, in the same hearing, Mrs. Voorhees testified that subsequent to the execution of certain Deeds by Mr. Voorhees to her, she and Mr. Voorhees executed deeds to the same property to the girls. (Tr. Oct. 21, p. 60).

Respondents have always maintained there was no delivery of any of these deeds. In fact, in their depositions which are quoted from on other matters by Appellant Voorhees, Respondents both testified that they had received letters from Appellant Voorhees stating she had recorded the deeds but that "I feel like a thief because if and when your father finds out all I can do is tell him that he has threatened suicide and that I had to protect myself." (Deposition of Betty Hayward p. 56. See, also, deposition of Beverly Clyde p. 12).

The civil action between Respondents and Appellant Voorhees came on for trial on April 1, 1959. In preparation for the trial Respondents had obtained the services of an examiner of questioned documents by the name of Harris, who at considerable cost and expense to Respondents had made a study of signatures of the decedent

in respect to various documents which Appellant Voorhees claimed involved transfer of assets prior to his death. Mr. Harris was present in Manti to testify on behalf of Respondents with respect to such signatures. Previously Mrs. Voorhees in her deposition had been examined concerning some of these questioned documents and had failed to state specifically whether the signature appearing on the document was that of her husband or whether it might have been signed by someone else.

Before the Court convened counsel for the respective parties had a discussion concerning the possibility of settlement so that the court was asked to give the partie some time to see if a settlement could be worked out. (Tr. April 1, p. 1). The court granted a recess until 2:00 p.m. that afternoon. During the interim counsel and the parties were able to effectuate a settlement of the case, which settlement was incorporated in the terms of a Memorandum of Understanding (Exh. 1) which was typed on the spot and read by and signed by all of the parties, with certain corrections made at the time of signing by Appellant Voorhees. As stated by Mr. Nielsen at that time:

> Because it is contemplated that this written Memorandum of Understanding will be formalized in a written Stipulation, we would prefer not to file it with the court but would be happy to furnish the Court with a copy for his examination, but in accordance with that written Understanding it is stipulated between the parties that pending the execution of the final formal Stipulation an Entry of Judgment therein, that the present action will be continued without date

> subject to being called up by either party should any question arise as to the interpretation of the Memorandum of Understanding now entered into or in connection with the accounting of the property which is agreed will be done by Mrs. Voorhees". (Tr. April 1, p. 1,2)

The Memorandum of the Understanding, after conceding certain property to Appellant Voorhees, provides:

> "7. The balance of all property, including the furniture and furnishings at Manti, including any increment or income therefrom, not included in or used to acquire the property described in paragraphs one to four inclusive, and owned or acquired by Hillard L. Voorhees, shall be included in his estate".

The Memorandum of Understanding went on to state that where Mrs. Voorhees had purported to sell some property while the title remained in her name that the proceeds from the sale would be accepted in lieu of the property, except in the instance of the real estate contract dated the .....day of October, 1958, which had been entered into between Mrs. Voorhees and Appellant Company.

The Memorandum of Understanding further provides that Appellant Voorhees would make an accounting to the court and would "immediately upon the execution of this Understanding" deposit with the Walker Bank and Trust Company "all property now in her possession, including bank accounts or bank deposit books, stocks, bonds or other securities; and shall, as soon as possible, prepare and submit a detailed accounting in respect to

her receipts and disbursements since the death of Hillard L. Voorhees and also account for moneys received by her during his last illness".

Within two week after the settlement of the civil action between the Respondents and Appellant Voorhees, Appellant Hanson Land and Livestock Company filed a Petition in the Probate matter setting forth that Appellant Voorhees had entered into a contract with Hanson Land and Livestock; that "said contract also recited that the buyer and seller each understood that the property described in both Parcels A and B could be decreed to be estate lands by a court in the then pending litigation"; that "petitioner therefore has a direct legal interest in and to whatever title in said lands vested in Pearl O. Voorhees upon the death of her husband Hillard L. Voorhees, and that she cannot waive or relinquish any such title in view of said contract without the approval of petitioner"; (R. 254) and asked the Court for an order authorizing Hanson Land and Livestock to be given notice of further proceedings in the probate matter. (R. 253-255). In connection therewith, the parties, including Respondents herein, signed a stipulation agreeing that Hanson Land and Livestock Company would thereafter be entitled to notice of "any proposed orders of any petition which might be filed in the above entitled action, which order or petition affects in any manner the right, title, and interest of Petitioner in and to the lands which are the subject of the contract dated the 21st of October, 1958 by and between Mrs. Pearl O. Voorhees, a widow, and Hanson Land and Livestock Company, a Utah Corporation, a copy of which contract is attached

to and included as a part of Petitioner's Petition herein". (R. 261). Based upon such stipulation the court entered an order stating that the Appellant Hanson should be given notice of any such proposed orders of Petitions. (R. 262-264). And the record discloses that Appellant Hanson has had notice of all subsequent matters in the probate proceeding.

The next matter of significance appearing in the probate file is the notice given by counsel for Respondents that the Respondents would call up for hearing and disposition by the court "the first and final account of the said Pearl O. Voorhees as administratrix of the estate of Hillard L. Voorhees, deceased, heretofore filed herein, together with the objections thereto filed by the said Betty Hayward and Beverly Clyde." (R. 273). This notice was served upon counsel for Appellant Hanson as well as for counsel of the other parties involved. (R. 274).

While the former appeal to this court in the matter of the estate of Hillard L. Voorhees, deceased, hereinabove referred to was still pending, Appellant Voorhees filed in probate what was designated as "First Report and Account of Administratrix and Petition for Approval of the same". (R. 125-136). Thereafter, Respondents filed written Objections to the report and account in which it was alleged that Appellant Voorhees, in addition to the items reported by her in the account, has "considerably more cash, real property, and personal property belonging to said estate and for which she has failed to account. At the time of his death said decedent owned considerable real property located in Sanpete

and Sevier Counties . . . Objectors allege that said administratrix should be required to appear and show cause, if any she has, why said property and assets described in the preceding paragraphs are not accounted for by her and reported as assets of the decedent." (R. 161-162).

This Petition was not heard until after the settlement of the civil action and after Appellant Hanson had obtained an order from the court authorizing it to intervene in all subsequent proceedings affecting the title to the real estate and requiring notice of such proceedings to be served upon it. Therefore, when notice was given by Respondents that the Petition, above referred to of Appellant Voorhees, would be called up for hearing and disposition, along with the objections filed thereto, Appellant Hanson was put on notice of the fact that the court would be called upon to pass on the question whether said real property should be a part of the Estate.

Appellant Hanson Land and Livestock Company received notice of the hearing of this Petition, which was set for August 31, 1959. No objections were ever filed to this petition or accounting by Appellant Hanson. In the meantime, a hearing of a Motion by Respondents in the civil action to have judgment directing Appellant Voorhees to deed said property to the estate had been set for August 29, 1959. Although Appellant Hanson was not a party to the civil action, in the Brief of Appellant Voorhees (p. 8) it is stated that on August 29th Appellant

Hanson "appeared because it had heard of the repudiation of the October contract."

As indicated above, in May of 1959, Respondents had filed a Motion in the civil action requesting the court to enter judgment on the stipulation "directing that all property, both real and personal, owned by Hillard L. Voorhees, deceased during his lifetime belongs to and forms a part of his estate and directing and requiring said Defendant to execute and deliver to the said Walker Bank and Trust Company, as administrator, a Deed to all real property owned by decedent during his lifetime." (Civil R. 21). This Motion was thereafter amended to describe more specifically the property referred to (Civil R. 24).

The hearing on this Motion was commenced on August 29, 1959, at which it appears Appellant Hanson was represented but did not participate. At the beginning of the hearing counsel for Appellant Voorhees advised the Court that "this matter ought to be set down for a day certain for an accounting on the whole thing."

> "THE COURT: The probate matter and this one?
>
> "MR. CHRISTENSON: Yes, the probate matter and this matter at one time." (Tr. Aug. 29, p. 13,14)

After some discussion between court and counsel it was agreed to, the court indicating it would hear part of the testimony that day. (Tr. Aug. 29, p. 16)

After hearing some of the evidence the matter was continued to September 15, 1959 and consolidated with the probate action. (Minute entries dated August 29, 1959 and August 31, 1959 in both civil and probate proceedings).

The day before the hearing on the continued matter Appellant Voorhees filed an Amendment and Supplement to her first and final report which was signed by her and notarized, and which set forth the following:

> "2. Pursuant to Memorandum of Understanding executed April 1, 1959, in the case of Betty Hayward, et. al., plaintiffs, vs. Pearl O. Voorhees, Defendant, No. 4,784, of the files and records of the District Court of Sanpete County, Utah, it was agreed that all property of Hillard L. Voorhees except a certain joint bank account, a certain contract with Freed Corporation and certain life insurance proceeds, the sole property of Petitioner, and except that amount used to acquire the residence at 3856 South 2140 East, Salt Lake City, Utah, and to landscape and furnish said residence, be included in said estate."

In paragraph 3 the "mountain ground located in Sevier County" was specifically identified as part of this property (although the Petition asserted it was to be subject to the contract with Appellant Hanson which was not the fact).

In connection with this supplemental Petition, Appellant Voorhees filed her account showing what credits and offsets she claimed to be entitled to. (R. 278-281). (The record does not disclose whether Appellant Hanson made an appearance at this hearing).

At the conclusion of the evidence, the court approved and settled the account of the Appellant Voorhees with certain exceptions and directed and entered judgment that said Appellant Voorhees deliver to Walker Bank and Trust Company various items of personal property and "a Warranty Deed to that certain real property located in Sanpete County, Utah, known as the 'farm' and that certain real property located in Sevier County, Utah, known as the 'moutain ground' ". (Minute entry dated September 15, 1959 in both civil and probate Record)

Thereafter, formal Findings of Fact and Conclusions of Law and Judgment were prepared by Appellant Voorhees' counsel and submitted to the Court and signed by the court as of October 2, 1959. (This judgment likewise directs that Pearl O. Voorhees execute and deliver a Warranty Deed to the Administrator of the estate covering the real property in question). Within a few days thereafter, and in satisfaction of the judgment entered by the Court on October 2, 1959, Appellant Voorhees executed and delivered to the Walker Bank and Trust Company as administrator of the estate of Hillard L. Voorhees, deceased, Warranty Deeds to the property in question. These deeds to the lands in question were voluntarily executed and delivered by Mrs. Voorhees to the Administrator shortly after in the presence of her counsel and counsel for Respondents and they contained no reservations of any kind whatsoever. Immediately thereafter the Administrator had said deeds recorded of record.

No appeal was taken from the judgment of the court entered in both the civil and probate matters on October 2, 1959, by Appellant Hanson. Nor was any appeal ever taken or attempted to be taken by Appellant Voorhees until the notice of Appeal given and filed under date of January 3, 1961 approximately fifteen months later, and after the judgment, insofar as it related to the delivery of the deeds to the Administrator had been satisfied for more than fourteen months.

The next matter of significance occurred in the probate proceeding on January 8, 1960, when the Walker Bank and Trust Company, as administrator of the estate of Hillard L. Voorhees, deceased, filed a Petition in the Court seeking confirmation of sale of the property here involved to Appellant Hanson, alleging that "on the 17th day of December, 1959 the following offer to purchase the above mentioned real property has been submitted to the administrator as follows:

> "Walker Bank & Trust Company, Administrator
> Estate of Hillard L. Voorhees, Deceased
> Salt Lake City, Utah
>
> We, the undersigned, Hanson Land and Livestock Company of Salt Lake City, Utah, hereby offer to purchase all of the Voorhees Estate interest in and to the grazing lands situated in Sevier County, Utah, consisting of approximately 2800 acres, for a consideration of $15.50 per acre, together with grazing permits for 1870 head of sheep in the Milford Unit No. 9, District No. 3, at $10.00 per head. We have heretofore deposited the sum of $10,000.00 as a down payment on this offer and we agree to pay the balance of the purchase price

following confirmation by the probate court, as follows:

10 equal annual installments, the first of which shall be payable within 30 days following the date an order confirming sale, plus interest to date, is entered by the probate court at Manti Utah and 1/10th thereof annually thereafter to and including a final payment to become due in the year 1969, plus interest at the rate of 4% from October 21, 1958, the date the undersigned company took possession of said lands under a previous agreement with Mrs. Pearl O. Voorhees, widow of Hillard L. Voorhees, deceased, and former Administratrix of his estate, to the date of confirmation and 5% per annum interest on the unpaid balance from the date of confirmation. It is understood and agreed that the exact acreage involved in this offer is to be subsequently determined and the price of $15.50 per acre will apply to only such acreage as the estate shall be in position to convey.

Within a period of 6 months from the date the sale is confirmed by the probate court, an abstract of title is to be furnished us covering all of the grazing land included in this offer.
Seller is to reserve all mineral rights in the lands conveyed to the purchaser if the sale is confirmed by the court.

HANSON LAND AND LIVESTOCK
COMPANY,
a Corporation

By G. Aaron Hanson
Its President"

On the same day, Respondents herein filed a Petition for a Partial Distribution to them of the same

real property, alleging that all claims against the estate, inheritance taxes is payable, and all debts of the estate have been fully paid, satisfied and discharged so that the estate was in the position to have distribution made and that Petitioner sought to have distributed to them the real property in question in accordance with the provisions of Sections 75-12-5 and 75-12-6, UCA 1953. Petitioners agreed, in exchange for said property so distributed to them, to deposit with the administrator of the estate the appraised value of the property so that such proceeds could be included in the trust in lieu of the property .(R. 300-303). Both Petitions were set down for hearing at the same time and due notice thereof given to all interested parties including Appellant Hanson. (R. 296,305).

Thereafter, Respondents filed objections and protest to the petition of the Walker Bank and Trust Company, stating that the protestants had already petitioned the Court to have distributed to them said real property in question as a part of their distributive share and that protestants were entitled to said property as heirs of said Hillard L. Voorhees, deceased. (R. 318-320). Likewise, Appellant Hanson filed a Petition in said probate matter "for confirmation of the sale" of the real property to it and protested the granting of Respondents' petition for partial distribution. (R. 321-326). Appellant Voorhees filed no written objections to either of the petitions.

Prior to the hearing on these petitions the Administrator filed a petition to confirm the sale of other proper-

ty received by it from Appellant Voorhees to third persons. No objections to this petition were filed by any of the parties. All of the petitions, including the petitions of the Administrator, the petition of Respondents and the petition of Appellant Hanson came on for hearing before the Court on February 1, 1960, all parties being present and represented by counsel. The court first heard the petition of the Administrator to sell both real and personal property not here involved and, no protests being made, confirmed said sales. (R. 328-331). After hearing evidence on the other matters the Court made the following ruling from the Bench:

> "The Court denies confirmation of the sale or any sale upon the petition or the bid of Mr. Winch. I grant a partial distribution. The decree for a partial distribution may provide that there be set over to these daughters, to these heirs an undivided two thirds interest in the property that is sought to be transferred by this sale, and I have a number of reasons for that that I don't think I need to express. One of them, the girls want it. There is no debt. They can deal with it as they like. The other one is Mrs. Vorrhees has already dealt with Mr. Hanson with respect to the matter. Perhaps she is bound with respect to her interest. This leaves it so that the parties can adjust it the way they want to, and you may draw an order, Mr. Nielsen. Court is in recess." (Tr. Feb. 1, p. 66, 67)

Thereafter, on February 16, 1960, the administrator filed a further petition asking for partial distribution to the widow of the other one-third interest in and to the same real property. (R. 337-341). Notice of the hearing of this petition was given to all parties and no protests

were filed by anyone. (R. 343). At the same time, however, a petition was filed by Respondents requesting distribution to them of the two-thirds interest of the estate in and to the property identified as the "Taylor Grazing Permit for the grazing of 1,870 head of sheep on the Milford Unit No. 9, District No. 3" owned by decedent during his lifetime. (R. 347-350). This petition was filed March 4, 1960 and came on for hearing at the same time as the petition of the administrator for distribution to the Appellant Voorhees of the remaining one-third interest in and to the real property. Notice of this petition was likewise given to all parties in question and objections to the petition were filed by Appellant Voorhees and Appellant Hanson.

The Hearing was held on the 28th of March, 1960, as shown by the appropriate Minute Entry of the Court, at which time Appellant Voorhees, through her attorney, asked permission to withdraw the Petition for Partial Distribution to her of her one-third interest in the real property, which motion was granted. The Court then went on to hear the evidence in respect to the petition of Respondents for partial distribution to them of the two-thirds interest in the grazing permit and thereafter determined that such petition should be granted. Since a transcript of the proceedings of March 28th is not before the Court, it must be assumed that the order of the Court is amply supported by the evidence.

Before the actual Findings of Fact and Conclusions of Law and Judgment of the Court on the several petitions could be prepared, it was necessary to obtain a de-

tailed abstract of the lands in question so that the complete legal description could be checked and corrected. This was done, and subsequently on October 13, 1960 the Court entered formal Findings of Fact and Conclusions of Law and Judgment on all the petitions. (R. 430-445).

Motions to vacate the judgments and for a new trial were filed by Appellant Voorhees and Appellant Hanson, as well as Objections to the Findings of Fact and a motion to amend the same. (R. 451-464). Thereafter, the Court heard the matters on December 5, 1960, and entered an order (as shown in the Minute Entry) denying the motions. This appeal was then taken on January 3, 1961.

Respondents regret that it has been necessary to set forth the facts in such detail. However, it is very essential that the Court have a full and accurate knowledge of all the pertinent facts to avoid any quesion or confusion which might rise from a lack of understanding of what has taken place.

For this reason Respondents feel it necessary also to correct some impressions or conclusions which appear in Appellants' statements of fact.

At page 2 of her Brief Appellant Voorhees states that the dispute necessitating this appeal involves a claim by the daughters that land and property deeded to the mother should be placed in trust and protected for her ultimate use and benefit. This is not the issue in the case. The issue is whether Appellant Hanson is going to get the property through Appellant Voorhees for

$15.00 per acre or whether the other heirs (Respondents) can claim their distributive shares of two-thirds interest therein at a value of $15.50 per acre. As Mrs. Voorhees testified in the hearing on February 1, 1960, she objected to a partial distribution of the land to Respondents "because if we have a partial distribution this land is going to have to be partitioned and this partial [partition] suit may last a year, two years or even three."

She further testified:

> "THE COURT: Well your objection is then as I understand it that without a sale of this property the trust can't be completed.
>
> "A. That's right.
>
> "THE COURT: That is your objection.
>
> "A. Yes, sir, and I cannot see.
>
> "THE COURT: That is your objection. Have you got any other objection?
>
> "A. No, only that I didn't put it in to be partially distributed. I put it in to be sold." (Tr. Feb. 1, p. 18)

Mr. Hanson well knew when he attended the hearing for confirmation of sale of the property to Appellant Hanson that if the property were sold the court would put it up to public bidding in court.

> "MR. WATSON: Mr. Hanson, you have been told by your counsel several times if there is a sale of this land that there will have to be an opportunity for bids in open court, haven't you?
>
> "A. Yes, sir.

"MR. WATSON: You were also told by the Administrator and myself were you not?

"A. Yes, sir." (Tr. Feb. 1, p. 48)

On page 6 of the same Brief appears the statement that Respondents originally filed a petition in the district court "to compel delivery of the estate property they alleged was wrongfully withheld". This statement is significant in the light of the subsequent argument by Appellants that failure of the Court (on the hearing of October 21st and December 16th, 1957) to compel delivery of the property at that time "constituted a determination of the facts". (See, Argument, p. 16) The petition filed by Respondents and which was heard by the Court on October 21st and December 16th, 1957 (prior to the former appeal in this matter) did not request the Court to compel delivery of the estate property wrongfully held by Appellant Voorhees. The petition requested that Appllant Vorhees be required to appear and submit to an examination, under oath, concerning property which she may have and to bring with the records and other documents with respect to her alleged ownership; but no request was made in that petition or in that hearing that Appellant Voorhees be required to turn over to the estate the property which Respondents claimed belonged to the estate. (R. 30). Again on page 7 Appellant Voorhees states that at the trial of the civil matter on April 1, 1959, the parties requested the Court to continue the matter "to give an opportunity to reach agreement". That was not the statement of counsel or the basis for the continuance of the case. The agreement had been reached between the parties, but it was intended that a formal stip-

ulation be entered for judgment after Appellant Voorhees had rendered her accounting for all property and assets which belonged to the estate. It being impossible for the parties thereafter to settle the accounting, the matter had to be heard by the Court and judgment entered on October 2, 1959. (Tr. April 1, p. 1,2)

The judgment not only settled all matters of accounting between the parties, but also determined that the property here involved be conveyed by warranty deed to the estate, which was voluntarily done by Appellant Voorhees.

Again, at page 11 of Appellant Voorhees' Brief appears the statement that in the hearing on February 1, 1960, she "testified that she intended to abide by her agreement with intervenor." That is not correct. Her testimony as appears on page 23 of Transcript of Proceedings, February 1, 1960 is to the effect that in her opinion it would be to the best interest of the estate to have the sale proposed by the Administrator to Appellant Hanson confirmed. (Tr. Feb. 1, p. 23). However, the Court found otherwise.

Finally on page 2 of the brief of Appellant Hanson appears the statement that the "Memorandum of Understanding" was not presented to the Court until August 29, 1959. That is not the fact. As the Transcript of the proceedings shows, the written Memorandum was presented to the Court at the time it was entered into and counsel stated that they would be "happy to furnish the Court with a copy for his examination," but counsel pre-

ferred not to file it with the Court pending "the execution of the final formal stipulation and entry of judgment therein". (Tr. April 1, p. 2)

No attempt was ever made to keep this Memorandum from Appellant Hanson, who was advised through his counsel immediately thereafter that it had been entered into by the parties settling the legal action.

STATEMENT OF POINTS

Appellants have set up three points which are discussed. Although they do not object to a discussion of the points raised by Appellants, Respondents submit that there is a preliminary problem which must be resolved before this Court can review or consider the Judgment entered on October 2, 1959. That proposition is whether an appeal therefrom at this time is proper. For that reason Respondents in their Brief will argue such matter first and then proceed to a discussion of Appellants' points, as follows:

POINT I.

WILL AN APPEAL LIE AT THIS TIME FROM THE JUDGMENT OF THE TRIAL COURT ENTERED OCTOBER 2, 1959?

POINT II.

ARE THE DECREES OF DISTRIBUTION VOID FOR WANT OF JURISDICTION?

POINT III.

IS THE JUDGMENT OF OCTOBER 2, 1959 SUPPORTED BY THE MEMORANDUM OF UNDERSTANDING?

POINT IV.

ARE THE FINDINGS OF FACT SUPPORTED BY THE EVIDENCE OR DO THEY SHOW THAT APPELLANT WAS WRONGFULLY DENIED THE RIGHT TO DEFEND HER PROPERTY?

ARGUMENT

POINT I.

WILL AN APPEAL LIE AT THIS TIME FROM THE JUDGMENT OF THE TRIAL COURT ENTERED OCTOBER 2, 1959?

Although Appellant Voorhees has devoted most of her Brief to a discussion of the judgment entered by the District Court in the civil action on October 2, 1959, no consideration has been given to the question whether an appeal will lie from such judgment at this time. Respondents contend that no appeal can be taken at this time. This issue was first raised at the time of filing Respondents' motion to dismiss the appeal herein. Since this Court apparently did not consider the merits of that motion in regard to the timeliness of the appeal (no opinion having been rendered but a penalty being imposed upon Appellants for failing to file the record on appeal in time) Respondents again wish to point out to the Court that the appeal from the judgment entered October 2, 1959 was not taken until January 3, 1961, fifteen months after the entry thereof.

This matter is specifically covered by the provisions of the Utah Rules of Civil Procedure. Rule 73(a) provides:

> "When an appeal is permitted from a District Court to the Supreme Court, the time within which an appeal may be taken shall be one month from the entry of judgment appealed from unless a shorter time is provided by law".

Although there are certain exceptions provided for such as where a motion for a new trial is pending, no such exception has any application in the instant case. No motion for a new trial or other motion was filed in either the civil or probate matters in respect to that judgment following its entry on October 2, 1959, until the notice of appeal was filed on January 3, 1961.

It is expected that Appellant Voorhees will contend that the judgment appealed from is not a final judgment, but is interlocutory in nature because the Court retained jurisdiction over this cause to adjudicate any matter which may arise under the Memorandum pending the final creation of the trust provided therein and in the further probate proceedings herein. (Civil R, 41)

Respondents contend that the judgment entered was a final judgment for purpose of appeal, notwithstanding the Court retained jurisdiction to adjudicate additional matters which might arise. See, *Parsons vs. Parsons,* 40 Ut. 602, 122 Pac. 907; and *Allred vs. Wood,* 72 Ut. 427, 270 Pac. 1089; (where the Court held that an interlocutory decree of divorce is final for purposes of appeal.) See, also, *In re Auerbach's Estate,* 23 Ut. 529, 65 Pac. 488, (where the Court analyzed what is a final judgment for purposes of appeal in a probate matter.)

If, however, it is answered that the judgment was not a final judgment for purposes of appeal, no appeal is proper since an appeal may be taken as a matter of right *only* from final judgments. (Rule 72(a) URCP)

Of course, under certain provisions an appeal may be taken from interlocutory orders. This matter is covered by the provisions of Rule 72(b) which provides that a petition may be made to permit an intermediate appeal from an interlocutory order or determination. Even here, however, the rule specifically states that the petition for such intermediate appeal must be filed "within the time required for filing a notice of appeal under Rule 73 (a)". Regardless of whether the judgment of October 2, 1959, is treated as interlocutory in nature or as a final judgment, no appeal therefrom will lie unless taken within one month from its entry.

The time prescribed by this rule for taking an appeal from is jurisdictional. (See, *Allen vs. Garner,* 45 Ut. 39, 143 Pac. 228; *Sorenson vs. Korsgaard,* 83 Ut. 177, 27 Pac. 2d 439). The above cases were decided by the Supreme Court prior to the adoption of the Rules. However, the same principle has been applied since the adoption of the Utah Rules of Civil Procedure. (See, *In re. Lynch's Estate*, 123 Ut. 57, 254 Pac. 2d, 454.)

In the Lynch case a petition was filed in a probate proceeding requesting an order directing the executrix of the estate specifically to perform a contract with petitioner. Such proceeding is very similar in nature to the motion which was filed by Respondents herein requesting

the Court to enter judgment against the Appellant Voorhees determining that the real property and other assets in her possession belong to the estate and directing and requiring her to execute deeds in favor of the Administrator as agreed to in the Memorandum of Understanding. The trial court in the Lynch case entered judgment in favor of the petitioner and the executrix thereafter within the time provided by the rules filed a motion to amend the decree or to grant a new trial. This motion was denied on November 22, 1952. Thereafter, on December 8, 1952, Appellant served on the Respondent a notice of appeal but failed to file the same with the Court until December 23rd. Respondent moved to dismiss the appeal for lack of jurisdiction claiming that the notice of appeal was not filed within one month after the motion to amend was denied. This Court granted the motion to dismiss because "the notice of appeal was not filed within one month as required". See, also, *Anderson vs. Anderson,* 3 Ut. 2d 277, 282 Pac. 2d 845.

Another reason why the appeal from the judgment of October 2, 1959, cannot be considered is that the judgment in the particulars to which this appeal is directed has been fully complied with and satisfied. The judgment, among other things, ordered and directed Appellant Voorhees to execute and deliver to the Administrator (Walker Bank and Trust Company) "a warranty deed to that certain real property located in Sanpete County, Utah, known as the 'farm' and that certain real property located in Sevier County, Utah, known as the 'mountain ground' ". (Civil R, 40) Within a very short time after the entry of this judgment Appellant Voorhees

executed and delivered to the Administrator the warranty deeds referred to. She also delivered to the Administrator all of the personal property specifically described in the judgment and ordered to be turned over to the Administrator. This was done voluntarily and at a time when no motion or other proceeding was pending to attempt to hold her in contempt of Court for failing to do so. She thereafter at no time filed a motion to set aside the judgment or to obtain relief therefrom until this appeal was attempted. Even though Appellant Voorhees was required under threat of punishment for contempt to comply with other provisions of the judgment, no attempt to appeal was made by her.

Respondents respectfully submit that there is no more reason for claiming that the judgment of the Court on October 2, 1959, is interlocutory in nature than there is to claim that the judgments of partial distribution herein appealed from are interlocutory in nature and therefore not appealable.

POINT II.

ARE THE DECREES OF DISTRIBUTION VOID FOR WANT OF JURISDICTION?

We believe that little need be said concerning Appellant Vorhees' claim that the lower court had no jurisdiction to enter the judgments of partial distribution, because the Administrator had no title, or right of possession in and to the property in question. Obviously this is not correct because, as stated hereinbefore, Appellant Voorhees conveyed the property to the Administrator by

warranty ded and such deeds were recorded. Since the entry of the Judgment of October 2, 1959, said Appellant has approved the conduct of the Administrator in dealing with the assets as part of the Estate, in selling the farm land and other properties and has accepted and received all of the benefits accruing to her therefrom. The only objection made at the hearing on February 1, 1960 was to the effect she wanted the "mountain ground" sold to Appellant Hanson.

It is further claimed that the Court had no jurisdiction to enter the judgments because in the initial proceedings instituted by Respondents in 1957 to require Appellant Voorhees to appear and submit to examination concerning the properties, no order was made requiring her to turn said properties over to the estate. Although this matter has been referred to above in the Statements of Facts, Respondents again point out to the Court that the petition requested only the right to an order of the Court to examine Appellant Voorhees as to such property and therefore the Court would had had no right to make such an order unless the pleadings were amended so to request.

Likewise, in the civil action prosecuted by Respondents against Appellant Voorhees, the latter raised no question of res adjudicata or otherwise attempted to assert any prior adjudication. We submit that any such asserted defense was and is impossible in the light of the prayer of the petition and the nature of the proceedings themselves.

POINT III.

IS THE JUDGMENT OF OCTOBER 2, 1959 SUPPORTED BY THE MEMORANDUM OF UNDERSTANDING?

Notwithstanding Respondents believe that no appeal will lie at this time from the judgment of October 2, 1959, they feel required to direct some attention to the matters raised by Appellant Voorhees as to the suffiicency of the Memorandum of Understanding to support the judgment. At the outset it must be remembered that the findings, conclusions, and judgment, recite that they are based upon the evidence adduced at the hearings. The Memorandum of Understanding was only a part of the evidence received.

Appellant Voorhees treats the Memorandum of Understanding entered into as a stipulation. A stipulation is defined in 50 Am. Jur. Stipulations, Sec. 2, p. 605, as follows:

> "A stipulation . . . in the sense in which the term is used in this article, is an agreement, admission, or concession made in a judicial proceeding by the parties thereto or their atttorney, in respect to some matter incident thereto, for the purpose, ordinarily, of avoiding delay, trouble, and expense".

With respect to construction of stipulations, Sec. 8, 50 Am. Jur. Stipulations, 609, provides:

> "As a general rule, stipulations should receive a fair and liberal construction in harmony with the apparent intention of the parties and the spirit of justice, and in the furtherance of fair trial upon the merits, rather than a narrow and technical one calculated to defeat the purposes of

> their execution . . . A stipulation must be construed in the light of the circumstances surrounding the parties and in view of the result which they were attempting to accomplish." and again: "*On appeal a stipulation and the finding of the court thereon should receive a construction with reference to existing laws effecting the subject matter. In case of doubt, appellant courts strongly incline toward the construction adopted by the trial court.*" (Emphasis added) (*Ibid*, p. 610)

Where a stipulation has been entered "one of the parties will not be allowed to withdraw from the agreement thus made without the consent of the other, except by leave of court upon cause shown". *Ibid*, p. 611) In the present instance Appellant Voorhees has never sought to withdraw from the Memorandum of Understanding made or to repudiate those portions thereof and of the judgment which inured to her benefit.

The findings disclose substantial credits were allowed her for family allowance and expenses. (Civil R. 34-37). Likewise, in the Memorandum of Understanding the children guarantee that Mrs. Voorhees will receive not less than $4200.00 per year, less any amount which she receives from social security so that since the entry of the judgments he has continued to receive from the assets in the hands of the Administrator the sum of $350.00 per month less any amount received from social security. She has never relinquished her claim to this amount and has never repudiated those portions of the Memorandum of Understanding which appear to be in her favor.

It is claimed that counsel for Respondents in open court at the hearing on August 29, 1959, stated that the parties were unable to reach an agreement. That is not correct. Counsel stated to the Court that "a written agreement of settlement was made and entered into that day in Court". (Tr. Aug. 29, p. 1) Counsel further stated that since the date of the settlement attempts had been made to obtain compliance with the agreement which had been unsuccessful, "so it was finally deemed necessary that this matter be brought back to the Court for the purpose of having the judgment entered in order to obtain compliance". (*Ibid.*, p. 1)

POINT IV.

ARE THE FINDINGS OF FACT SUPPORTED BY THE EVIDENCE OR DO THEY SHOW THAT APPELLANT WAS WRONGFULLY DENIED THE RIGHT TO DEFEND HER PROPERTY?

Counsel for Appellant Voorhees states "when the Court gave the Memorandum of Understanding the quality of evidence and entered the judgment of October 2, 1959, the mother lost her right to defend her title." Counsel should have stated that when the mother entered into the Memorandum of Understanding on April 1, 1959, she conceded that she had no right to claim she was *entit*led to the property in question.

It is further argued that the findings of the trial court do not support the judgment of Partial Distribution, nor is the evidence sufficient to sustain the findings, conclusions and judgment as to Partial Distribution.

The provisions of the statute (Sec. 75-12-5, UCA 1953) permit partial distribution of the property of the estate *without requiring full and complete distribution of the assets of the estate* by the Court being satisfied that no one will be prejudiced by withholding parts of the assets for distribution at a future time. Otherwise, it would appear from the provisions of this statute that the Court should immediately make a complete and total distribution upon the Administrator filing a report and final account.

The law specifically provides that the property of the decedent "both real and personal," passes to the heirs, "subject to the control of the Court and to the possession of any adminitrator appointed by the Court for the purposes of administration." (Sec. 74-4-2, UCA, 1953).

Sec. 74-4-3, UCA, 1953 further provides that one-third in value of the legal or equitable estate in real property possessed by the husband shall be set apart as the property of the wife if she survives him. Under the provisions of these two sections, this Court has previously held that title to property passes immediately to the heirs upon the death of the decedent, subject only to administration and payment of debts. *Chamberlain vs. Larson*, 83 Ut. 420, 29 Pac. 2d, 355; *Jones vs. State Tax Commission*, 99 Ut. 373, 104 Pac. 2d, 210.

In the instant matter a dispute arose between Appellant Voorhees and Respondents as to whether the real property and certain personal property was a part of the estate of Hillard L. Voorhees, deceased, and the civil

action was prosecuted for the purpose of determining this question. That matter was resolved when Appellant Voorhees agreed to, and did convey, the property to the estate and have it administered as the part of the assets of the estate. A report has been made not only to the probate court that the property belonged to the estate, but also to the State Tax Commission and inheritance taxes have been paid thereon, all of which has been done with the full knowledge, consent and approval of Appellant Voorhees, and without objection on the part of Appellant Hanson who was given notice of all petitions and other motions filed. If, as Appellant Hanson now claims, it is entitled to the property under its contract, it should have petitioned the count to have the property or some portion thereof set aside to it rather than seeking to buy the property from the Administrator and thereby acknowledging the latter's title.

The only claim which Appellant Hanson has or may have to the property in question (after the entry of the judgment on October 2, 1959) is to claim the right to the one-third interest of Appellant Voorhees as the surviving widow. Actually steps were taken to make this claim when the Administrator at the instance of Appellant Vorhees filed a petition in the probate court seeking to have set aside to here her one-third interest in the real property in question. (R. 337-341) How can Appellant Voorhees on the one hand ask the Court to distribute to her one-third of the real property in question and object to the Court distributing to the other two heirs the two-thirds interest which they have in and to tne same propery? Although the record has not been certified to this

Court as to the proceedings on March 28, 1960, the Minute Entry of the Court entered for that date indicates that upon motion of counsel for Appellant Voorhees the petition for a partial distribution to her was withdrawn "to be brought up at a later date".

With regard to the evidence being sufficient to support the findings, conclusions and judgment, the testimony of Clair Mortenson, Trust Officer for Walker Bank and Trust Company, as well as the records before the Court, clearly disclose that all of the conditions precedent to partial distribution were satisfied as required by Sec. 75-12-5. The only claim of Appellants now apparently is that there was no showing that it would be for the best interest of the beneficiaries of the estate because of the fact that a higher price than that which was to be paid in by the daughters for inclusion in the trust could be obtained by selling the property. In the first place it is not the perogative of the probate court to sell property where not needed to pay the debts or claims against the estate because the heirs are entitled to the property and have title to it subject to administration. (Sec. 75-10-1, UCA, 1953) And the matter of determination as to whether it is for the best interest of the estate is left to th ediscretion of the trial court. See, *Nielson's Estate v. Nielson*, 107 Ut. 564, 155 Pac. 2d, 968.

Appellants argue that because a higher bid was made in Court for the sale of the property that it, therefore, appears obvious that it would not be for the best interests of the beneficiaries to distribute it. The trial court immediately saw through this subterfuge and we hope that

this Court can do likewise. The so-called bid of Appellant Hanson for $18.00 per acre for the land involved and $10.00 per acre for the permit rights was made "with the understanding that it is not prejudiced to the contract or any right under the contract between Hanson Land and Livestock Company and Pearl O. Voorhees." (Tr. Feb. 1, p. 60)

Under the contract between Appellant Voorhees and Appellant Hanson which was before the trial court (R. 245-251), it was agreed that Appellant Voorhees' interest in the property "could be decreed by the court in the above action or the probate proceedings" to be all included within the estate of Hillard L. Voorhees, deceased, and in which event "the buyer would become entitled to only that portion of sales revenue from the sale of any or all of the above described peroperty, included within said estate, in proportion to the total value of the said estate less any costs of administration and any federal or state inheritance taxes, which would be proportionately deducted from any revenue from said property received by the buyer". Since the agreement for the purchase of the interest of Appellant Voorhees in the property was at the rate of $15.00 per acre, Appellant Hanson would be entitled to receive as the assignee of Appellant Voorhees here share of any increment or increase which might have to be paid or which would be by the estate over and above said $15.00 per acre as indicated in the above contract. It was for this reason that the Court in concluding to order partial distribution stated that Appellant Voorhees had already dealt with Mr. Hanson with respect to her interest and "this would leave it so that the parties

can deal with their respective interests as they may desire to do." (Tr. Feb. 1, p. 66-67)

There being no other claim that the evidence does not support the findings, conclusions and judgments of the Court regarding the partial distribution, such judgments should be affirmed.

CONCLUSION

By way of summary Respondents respectfully submit:

1. Any attempt to appeal from the judgment of October 2, 1959 is untimely and the Court has no jurisdiction to hear or consider any matter with respect thereto.

2. In any event the judgment of October 2, 1959, which was entered in both the civil and probate proceedings, was and is binding upon Appellant Voorhees and Appellant Hanson Land and Livestock, they both having had notice of the hearings out of which said judgment arose and the judgment is not only a valid exercise of the Court's power but binds and controls the parties thereto.

3. The ground here in question constituting a part of the estate of Hillard L. Voorhees, deceased, in accordance with the Memorandum of Understanding of the parties and the judgment of the Court entered on October 2, 1959 (as well as the warranty deed thereafter executed by Appellant Voorhees to the Administrator), the

heirs are entitled to a distribution to them in kind unless under the provisions of Secton 75-10-1, UCA, 1953, sale of the property is necessary to pay the debts of the decedent or expenses and charges of administration or would otherwise, in the discretion of the probate court, be for the advantage, benefit and best interests of the estate and those interested therein. The probate court having determined that it would not be for the best interest of said estate that said property be sold, and further determining upon proof being submitted that all of the debts and expenses of the administration are paid and amply provided for, its determination to enter an order of partial distribution in accordance with the provisions of Section 75-12-5, was and is in order and such judgments should be affirmed.

Respectfully submitted,

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